Elections and the Courts: A Busy Year

Courts around the country are busy dealing with many, many election law cases. In the last few months we’ve seen court action on:

- Voter ID in Pennsylvania, South Carolina, Texas and Wisconsin.
- Voting technology in Colorado, New Jersey and Pennsylvania.
- Early voting hours in Florida and Ohio.
- List maintenance, including searches for non-citizens on the voting rolls, in Florida, Indiana, Iowa and Ohio.
- The role of the federal government, under the Voting Rights Act, in preclearing election policy changes in Alabama, Alaska, North Carolina, South Carolina, and Texas.
- The language used to describe a voter ID ballot measure in Minnesota.
- A “right church, wrong pew” case in Ohio that looks at what happens when a voter goes to a polling place with several precincts and votes at the wrong one.
- Challenges to new restrictions on third party registration drives in Texas and Florida (one and two).

All told, some 33 high profile cases are still pending, according to the database, Election Law@Moritz. That number may increase sharply after Election Day.

These cases have come from advocates on both the left and the right. They’ve been filed by states against the feds, as well as the feds against states. Some pit local election officials against state officials.

While most of the litigation is in state courts or federal district courts, some cases have arrived at the U.S. Supreme Court. “It is a virtual certainty that the Supreme Court will address the constitutionality of Section 5 of the Voting Rights Act,” says Ned Foley, law professor at The Ohio State University Moritz College of Law. Section 5 says that certain states and jurisdictions with a history of discriminatory election practices must seek federal approval before any changes are made to election procedures. (cont. on p. 2)
Increase in Cases—and Why

Do these high-profile cases make this year different from all others? Yes, but maybe not wildly different, say election watchers.

“When I first started teaching Election Law in the 1990s, the off-season for election disputes was all the time except for the fall of even-numbered years,” says Rick Hasen, a law professor at the University of California, Irvine. “These days, it is hard to keep up with all the litigation filed every year, though it always peaks in presidential election years.”

In terms of the sheer numbers, courts in the U.S. collectively decided, on average, fewer than 100 election-related cases per year in the last century. Since 2000, that figure has more than doubled, to over 230 such cases nationally per year.

And 2012 in particular? “The litigation feels earlier and more widespread,” says Foley.

Politics is one explanation for the increase in election litigation. “Prior to 2000, politicians and campaigns believed that if lawyers were used in elections, it would look like they were trying to tilt the election,” says Heather Heidelbaugh, the co-chair of the Republican National Lawyers Association.

“After 2000, campaigns and politicians have shown a level of acceptance for lawyers being involved in the process. These lawsuits, if you dig deeper, are brought in order to gain advantage at the polling place.”

Besides politics, “there is a lot of new election law and technology since 2000,” says Hasen. Congress passed the Help America Vote Act in 2002, and the Military and Overseas Voter Empowerment Act of 2009. Ever since, states have been passing legislation to comply with these—and additional legislation to keep up with changes in everyday technology as well. In many states, legislation is required to permit online voter registration, data exchanges, new voting equipment choices and pilot programs for internet voting for military voters. As any first year law student knows, new laws are more open to challenge than established law.

Legislative Angle

If more laws mean more challenges, so be it. But legislators would prefer not to have their laws challenged—indeed, they want them to be enacted, implemented and enforced.

That means they craft their legislation with legal issues in mind. “I look at what’s been the pattern historically, what are recent decisions in federal courts and in other states, and also at potential conflicts with federal laws and what other legislation is out there,” says Wisconsin Representative Jeff Stone, the author of Wisconsin’s 2011 photo voter ID legislation.

Legislators don’t go it alone. Staff help vet proposed changes to voting rules, as well as all other proposals. In Wisconsin, for instance, bill drafters write “drafter’s notes” that flag any constitutional or federal pre-emption issues the drafter anticipates. When the bill gets a committee hearing, staff counsel may be asked to discuss any foreseeable legal hurdles. Advocates as well as executive branch agencies are likely to weigh in at this point, too.

Stone followed voter ID legal issues over the course of a decade prior to last year’s enactment of Wisconsin’s bill. He modeled his legislation after Indiana’s, which was upheld by the U.S. Supreme Court in Crawford v. Marion County Election Board. The court left open the possibility for further challenges by individual plaintiffs who claim to be affected by the law. And yet, even with all this careful vetting, Wisconsin’s voter ID law has engendered four court cases.

The message: legal certainty for new legislation is nearly impossible.

“There can be case law that’s not clear, there can be issues that have not been addressed by the courts, or case law (cont. on page 3)
in another state that might not apply,” says Jessica Karls-Ruplinger, senior staff attorney for Wisconsin’s Legislative Council. “Especially in election law, there has been significant case law developing over the last few years. It is up to the legislator to decide how to proceed.”

**Tips to Reduce Litigation**

How can legislators improve election processes while minimizing legal risks? They can:

- Strive to enact election-related legislation in the years immediately after a general election takes place. This gives election administrators time to implement changes, according to Foley.

- “Work on issues where there may be common ground, such as modernizing voter registration systems, rather than passing laws along party lines,” says Hasen.

- “Look at the possibility of working with the courts to put a moratorium on election litigation 90 days or so before an election,” says Doug Lewis, executive director of The Election Center.

- Consider moving from the current system, where in most states partisan officials oversee elections, to non-partisan commissions, as recommended by the Carter-Baker Commission Report.

- And last, “states can prepare for the possibility of unresolved elections on election night,” says Foley.

**Final Thoughts**

Even with the best efforts of legislators and administrators, Foley says an election in a presidential year is “virtually certain” to lead to disagreements which will lead to important litigation. “You can’t predict which state or which election. We all just hope it’s not the presidential election.”

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**Getting Up to Speed on Election Law: Three Ideas**

ONE: The [Election Law@Moritz](#) database is an easy place to learn about election case law. Begun in 2004 at The Ohio State University’s Moritz College of Law, all major elections-related cases from around the nation are summarized in easy-to-understand language, and all filings and findings are catalogued. In a phrase, this is the premier source of data about voting-based court cases, and it is available without a password or a subscription. (Once cases are settled, they move to the archives, just a click away.)

TWO: Election-related war games, run by the [Election Law Program](#) at William and Mary Law School, troubleshoot state election statutes and educate judges about the unique nature of election litigation. If your state hasn’t “played” yet, you might learn from videos of the “games” in [Colorado](#) and [Virginia](#).

THREE: The American Law Institute has created a working group on [Principles of Election Law](#), with Ned Foley at the helm. A group of attorneys, judges, academicians and others in the election world are taking a deliberative and non-partisan look at voting process laws, and may come up with something like a model election code. So far, the project has worked on recounts. “We want the product to be something that has a genuine chance of having traction for its intended audiences,” says Foley. And those audiences? Judges and legislators. More working members are welcome.

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**Resources on Election Law**

- [Election Law Program at The College of William and Mary](#)
- [Election Law Resource Guide](#), from the National Center for State Courts
- [SCOTUSblog](#), which follows the U.S. Supreme Court. The [online symposium](#) about the Alabama case, *Shelby County v. Holder*, explains Section 5 issues well.
How does the Electoral College work? This is a common question in the fall of presidential election years. Many good answers exist. The basics are available on NCSL’s Electoral College webpage. More nuts and bolts are included at How the Electoral College Works, from the U.S. Election Assistance Commission. Khan Academy’s video, Electoral College, takes a fun approach. For FAQs, history and an “electoral college calculator,” go to the National Archives. Or, for a book that has it all, find a copy of the 3rd edition of After the People Vote, edited by John Fortier, of the Bipartisan Policy Center.

Below are a few facts that go beyond the basics, facts chosen for—the people who decide on Electoral College policy.

- State legislatures can select their states’ electors themselves, without any popular vote at all—although the last time this was done was in Colorado in 1876.
- States delegate the task of nominating electors to political parties. They may specify that electors are to be nominated at a party convention or by a party committee, or they may leave the mechanism entirely up to the party to decide.
- In five states (Arizona, North Dakota, South Dakota, Idaho and Oklahoma) the names of the nominated electors appear on the ballot, in addition to the name of the presidential candidate the electors represent.
- State statutes dictate how to divvy up their electors—and that means legislators can decide to change their states’ procedures.

It is the last point that gets the most attention. Because the Electoral College’s results do not represent strict equality among states, some people are looking for a system they consider to be more equitable. For instance, Nebraska and Maine use a “district” system. These states award two electors to the winner of the popular vote in the state, and the other electors are assigned on the basis of the popular vote in each Congressional district.

The National Popular Vote compact is another approach to increasing “fairness,” one that gained ground in 2011. Under this scheme, when enough states join the compact to represent more than one-half the nation’s electors, these states will send their electors in support of the winner of the national popular vote, not the state’s popular vote. Bingo: the winner of the national popular vote will automatically prevail in the Electoral College. (For more on this, see NCSL’s webpage, National Popular Vote.) Eight states plus the District of Columbia have signed on so far; no new states have joined in 2012.

What about the politics of NPV? “I don’t think there is an institutional advantage built into the Electoral College for one party or the other; I do think the district system does skew slightly against the Ds,” says Fortier, a supporter of the Electoral College.
From the Chair

Senator Ray Holmberg is North Dakota’s chair of the Committee on Appropriations and of the Joint Committee on Legislative Redistricting. He began his legislative career in 1977, and almost immediately became involved with all things elections-related. While his legislative assignments have changed over time, his interest in running good elections never has. On September 13, 2012, NCSL asked him about North Dakota’s elections.

Excerpts:

- It’s true that we don’t require registration; people can come on Election Day and vote. And yet the election workers do have a list of all the people who have voted in the past, or are potential voters. We kind of have a ‘velvet glove’ approach to voting. We do require a photo ID, but a voter without it is allowed to sign an affidavit, and allowed to vote on a regular ballot, not a provisional ballot.

- With the influx of new people moving into the state, running elections is more of a challenge. It’s more problematic now that we can’t rely on knowing everybody. Also, our counties and cities which handle voting precincts have consistently reduced their number of precincts. There are 450 statewide now, whereas there used to be 2500. With bigger precincts, it gets harder to know everyone.

Read the full interview here for more on vote-by-mail, precinct numbers, politics and signature requirements for initiative petitions.

The Election Administrator’s Perspective

Lori Edwards is beginning her fourth 4-year term as the supervisor of elections in Polk County, Fla. She describes her jurisdiction of 340,000 voters as “in the middle of the I-4 corridor, between Tampa and Orlando, which is the swing part of one of the biggest swing states.” Now she is the incoming president of the Florida State Association of Supervisors of Elections. On September 18, 2012, NCSL asked her about her perspective on Florida’s readiness for the presidential election and beyond.

Excerpts:

- I served as a state legislator for eight years before terming out, and running for my current position. Because I’ve been a legislator, it’s harder to bluff me.

- Election officials get up every day wanting to serve their voters; it is the professional ethic. But in our recent climate, the administrative concerns are always second tier to those of the political parties or the activists, and yet we’re the ones you depend on to give you a fair election.

- We are concerned about this year’s very big ballot and the logistics that will entail. The ballot is four oversized pieces of paper, printed on both sides. That translates in a large county into tons and tons of paper that must be moved and processed, always under secure systems.

Read the full interview here for more on voter purges, third party registrations and money to run good elections.

Bookmark This: Election Updates

The tag line for this blog is “New research, analysis and commentary on election reform, voting technology, and election administration.” It’s written by academics such as Charles Stewart III, Lonna Rae Atkeson, Paul Gronke, Michael Alvarez and Thad Hall. Fortunately, they’re all able to focus in on details, and also able to zoom out to the “30,000 foot level,” as a broader perspective is known around here. Posts are sporadic, so this won’t break the inbox, either.
In Congress, House Democrats have proposed a bill to permit voters without a state-required ID to vote using an affidavit, circumventing state laws. House Republicans have proposed a bill to require that in federal elections, everyone would be required to show a photo ID. Neither bill is likely to go anywhere. NCSL takes no stand on voter ID, but it does have a policy against pre-emption of state laws in general, including in the area of election administration.

Since 2008 in Georgia, 1,568 votes were cast on provisional ballots because of that state’s voter ID law—and never counted because the voters did not show up afterward with proper ID. That is out of 13.6 million votes cast during that time period, according to the Atlanta Journal-Constitution.

Puerto Rico requires voters to show an ID to vote, but with a twist. “Photo ID cards here are issued by the Commonwealth Elections Commission at no cost to all voters,” says Manuel Alvarez-Rivera, from Elections in Puerto Rico. “The photo voter ID system has been in place here since 1979, and although it had a decidedly rough start for the 1980 general election, it has been working well since 1984.” These cards are the only form of ID accepted for voting. Here is the official English-language translation of the act.

Please meet “Ad Hawk,” an app that is like Shazam, except that it works for political ads instead of music. (For us old-school folks, Shazam is an app that listens to a snippet of music, and within seconds provides the name of the song and the artist.) Ad Hawk, developed by the Sunlight Foundation, listens to political ads, then provides the name of the sponsoring organization, plus information on that group’s spending for & against candidates, its ad buy history, and a link to information on its donors.

In September, the Inspector General for the Department of Defense wrote this report: Assessment of the Federal Voting Assistance Program Office Implementation of the Military and Overseas Voter Empowerment (MOVE) Act. It says that not all military bases have an Installation Voting Assistance Office, as required by law, and that IVAOs may not be the best way to reach members of the military in this day and age.

The convenience store 7-Eleven is doing a convenient, informal poll of support for President Barack Obama and Republican presidential nominee Mitt Romney. Between now and Nov. 6, it is selling coffee in blue, red and non-partisan cups and automatically tallying the coffee vote. In the last three presidential elections, the 7-Eleven poll has picked the winner.

From NCSL’s Elections Team

The election is barely a month away—not that readers of The Canvass need to be told that! If you want to know the results of legislative races and ballot measures around the nation, go to NCSL’s StateVote 2012, the premier source of state-level election data. It should be live just about the time you are reading this. And there’s more: NCSL’s pre-election webinars are available online. Jennie Drage Bowser previews the initiative and referendum landscape, and Tim Storey does the same for the nation’s election, from a state legislative perspective. Many thanks, and as always, please keep in touch.

Jennie Drage Bowser, Susan Frederick and Wendy Underhill

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